

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRIAN JOHNSON, et al.,

Plaintiffs,

vs.

MICROSOFT CORPORATION, a
Washington corporation,

Defendant.

No. CV06-0900 RAJ

DEFENDANT MICROSOFT
CORPORATION'S OPPOSITION
TO PLAINTIFFS' MOTION FOR
LEAVE TO FILE THEIR THIRD
AMENDED CONSOLIDATED
COMPLAINT

NOTED ON MOTION CALENDAR:
January 8, 2010

MICROSOFT'S OPPOSITION TO PLAINTIFFS'
MOTION FOR LEAVE TO AMEND
Case No. CV06-0900 RAJ

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I. SUMMARY

Three and a half years into this putative class action, Plaintiffs seek leave to file a fifth version of their complaint that would eliminate the class allegations and add claims for misrepresentation and injunctive relief. Plaintiffs' proposal is shocking not only for its timing, but also because it appears to be part of a cynical attempt to game the system that continued when they withdrew their second class certification motion on the day their reply brief was due. Indeed, Plaintiffs now claim to want to pursue the case on an individual basis only, even though they previously filed a Second Amended Consolidated Complaint ("Second Amended Complaint") that expanded their proposed class to hundreds of millions of Windows XP users.

Although Plaintiffs' scheme to withdraw their class allegations constitutes a major reversal in strategy, they offer no explanation for it. Even stranger, they propose to add injunctive relief claims after Microsoft's class certification opposition demonstrated that such claims could not be certified because, among other reasons, they were not pled. Plaintiffs' actions suggest they seek to dodge an unfavorable certification decision now with the intent of attempting to re-inject their class allegations when they think their odds for success improve.

This Court should allow Plaintiffs to amend their complaint to withdraw their class allegations *only if the withdrawal is final*. Faced with a proposed class action that seeks hundreds of million in damages, Microsoft invested a huge amount of time and money to oppose class certification *on two separate occasions*, with its most recent opposition consisting of a forty-page brief, five declarations, and hundreds of exhibits. Now that class discovery has ended, the certification question is ripe for adjudication. If Plaintiffs have any intent of ever seeking certification in this case, the time is now.

Microsoft also opposes Plaintiffs' motion to the extent that it seeks to add proposed claims for misrepresentation and injunctive relief. The record shows that Plaintiffs' proposed claims are futile and would not survive a summary judgment motion. Plaintiffs' request to add these claims should also be denied because of their undue delay and the substantial prejudice that

would be inflicted upon Microsoft. Plaintiffs have known about the factual predicate for their proposed claims for more than fifteen months and their untimely addition would unfairly force Microsoft to re-do much of its costly discovery. If leave to amend is granted, Microsoft should be awarded an amount necessary to reimburse these expenses.

Plaintiffs provide no explanation why their decision to withdraw their class allegations was delayed until the eve of the class certification hearing and after Microsoft filed its opposition. Plainly the timing of this decision was tactical, and Microsoft should be awarded its attorneys' fees and costs incurred in preparing its second class certification opposition.

II. FACTS

A. Plaintiffs' Prior Four Complaints and First Class Certification Motion.

Plaintiff Johnson commenced this action on June 26, 2006. Within days, five other plaintiffs filed a similar suit against Microsoft in the same Court. *See Engineered Process Controls, LLC ("EPC") v. Microsoft Corp.*, No. 06-0927 (W.D. Wash.). The complaints proposed nationwide classes of Windows XP users who installed Microsoft's Windows Genuine Advantage ("WGA") Validation software. *See* Johnson Compl., Dkt. No. 1 ¶ 34; EPC Compl., Case No. 06-0927, Dkt. No. 1 ¶ 35. In their two complaints, Plaintiffs asserted eight causes of action, including one for misrepresentation. *See* Johnson Compl., Dkt. No. 1 ¶¶ 41-78; EPC Compl., Case No. 06-0927, Dkt. No. 1 ¶¶ 44-86.

On January 11, 2007, Johnson and the *EPC* plaintiffs consolidated their lawsuits by filing a First Amended Consolidated Complaint ("First Amended Complaint") that asserted a brief class period beginning April 25, 2006 and ending June 26, 2006. *See* Dkt. No. 22 ¶ 19, 51, 112, 122, 133. Rather than proceeding on all eight claims, Plaintiffs trimmed their case to three – breach of contract, violation of the consumer protection act, and trespass. *Id.* ¶¶ 67-133. Notably, Plaintiffs dropped their misrepresentation claim. *Id.*

On August 31, 2007, Plaintiffs filed their *first* class certification motion. *See* Dkt. No. 72. Twelve days before the December 30, 2007 deadline for Microsoft's opposition, however,

1 Plaintiffs unexpectedly withdrew it. *See* Dkt. No. 126. Plaintiffs' last-minute maneuver forced
 2 Microsoft to scrap its nearly completed class certification opposition.

3 On January 12, 2008, Plaintiffs moved for leave to amend their First Amended
 4 Complaint. *See* Dkt. No. 130. They sought to expand their proposed two-month class period
 5 (April 25, 2006 to June 26, 2006) more than fourteen times (July 25, 2005 to the present), insert
 6 an unjust enrichment claim, and add five plaintiffs. *Id.* at 2-4. Plaintiffs argued that documents
 7 purportedly showing that Microsoft "misrepresented the true nature of the WGA program"
 8 justified these amendments. *Id.* at 4. On March 21, 2008, the Court granted Plaintiffs' motion,
 9 permitting the filing of their Second Amended Complaint. *See* Dkt. No. 137.

10 **B. Plaintiffs' Last-Minute Withdrawal of Their Second Class Certification**
 11 **Motion and Untimely Request to File a Fifth Version of Their Complaint.**

12 On September 15, 2008, Plaintiffs filed their *second* class certification motion. *See* Dkt.
 13 No. 164. Plaintiffs argued that the case is a "paradigmatic example" of a class action and that
 14 prosecuting their claims in a single proceeding would be "superior to separate litigation of
 15 individual actions." *Id.* at 1, 38. On September 22, 2009, Microsoft filed its class certification
 16 opposition and supporting declarations. *See* Dkt. Nos. 211-16. When the deadline for Plaintiffs'
 17 reply brief arrived, they once again withdrew their class certification motion, *see* Dkt. No. 221,
 18 and said that they "intend to file a motion to amend the complaint withdrawing their class claims
 19 on the remaining causes of action." *See* Ex. A.¹ Plaintiffs provided no explanation for their
 20 unusual eleventh-hour decision.

21 On December 14, 2009, Plaintiffs filed their motion for leave to amend yet again. *See*
 22 Dkt. No. 223.² However, in addition to proposing to withdraw their class allegations, Plaintiffs
 23 seek to add claims that: (1) Microsoft made fraudulent and/or negligent misrepresentations

24 ¹ All of the exhibits cited herein are attached to the Declaration of Karl J. Quackenbush in Support of
 25 Microsoft's Opposition.

26 ² A copy of Plaintiffs' proposed Third Amended Complaint is attached as Exhibit A to their motion for
 leave to amend.

1 during the installation of WGA Validation through Microsoft Update, *see* proposed Third Am.
 2 Compl. ¶¶ 48-60, 232-58; (2) Microsoft made fraudulent and/or negligent misrepresentation
 3 during the installation of WGA Validation through Automatic Updates, *see id.* ¶¶ 60-83; and (3)
 4 they are entitled to more than a dozen forms of injunctive relief, *see id.* ¶¶ 218-19.³

5 **III. ARGUMENT**

6 **A. Plaintiffs' Request to Withdraw Their Class Allegations Should Be** 7 **Granted Only If the Withdrawal Is Final.**

8 This Court should grant Plaintiffs leave to amend to withdraw their class allegations only
 9 if the withdrawal is final. Rule 16(b)(3)(A) of the Federal Rules of Civil Procedure “requires the
 10 district court to include in its scheduling order a deadline or other time limitation on amending
 11 the pleadings.” *See AZ Holding, L.L.C. v. Frederick*, 2009 WL 3063314, at *2 (D. Ariz. Sept.
 12 22, 2009). Without a court-imposed deadline now, Plaintiffs may continue to seek amendments
 13 – including an amendment to re-introduce the class allegations they now purport to want to
 14 withdraw. Indeed, Plaintiffs’ proposed Third Amended Consolidated Complaint (“Third
 15 Amended Complaint”) asserts class allegations in the dismissed breach of contract claim even
 16 though they told the Court they would remove all class allegations. *See* proposed Third Am.
 17 Compl ¶ 85.

18 An immediate deadline for seeking further amendments is warranted because Plaintiffs’
 19 conduct shows that they are likely trying to game the system by withdrawing their class
 20 allegations now only to re-inject them later. Microsoft’s recently-filed class certification
 21 opposition demonstrated that Plaintiffs’ request for Rule 23(b)(2) certification should be denied
 22 because, among other reasons, they sought predominantly monetary, rather than injunctive,
 23 relief. *See* Dkt. No. 211, at 11-14. With their proposal for new injunctive relief claims,

24 ³ Windows Update and Microsoft Update (collectively “Microsoft Updates”) are Web sites that users can
 25 visit to choose software they want to download. *See* Dkt. No. 212 ¶ 16. By contrast, Automatic Updates
 26 is a feature that allows updates to be delivered to users’ computers. *Id.* ¶ 17. Many users know about
 Automatic Updates because they have seen the familiar bubble that appears in the lower right corner of
 computer screens when updates are ready to install. *Id.*

1 Plaintiffs seek to add the types of claims that one would expect from a plaintiff who attempts to
2 bolster his chances for class certification – not one who purports to withdraw class claims.

3 The deadline for seeking further amendments should be now. During the more than three
4 and a half years that this case has been pending, Microsoft has prepared two class certification
5 oppositions, and responded to 166 document requests, 92 requests for admission, 43
6 interrogatories, 21 written deposition questions and two Rule 30(b)(6) deposition notices. *See*
7 Dkt. No. 107 ¶¶ 2-15; Dkt. No. 160 ¶¶ 2-4. Plaintiffs have had more than ample time – and have
8 obtained more than sufficient discovery – to determine what substantive claims they want to
9 pursue and whether those claims are suitable for class-wide treatment. As a result, Plaintiffs will
10 suffer no prejudice by the entry of an immediate deadline for seeking further amendments.

11 If the Court does not bar further amendments now, it should at least deny Plaintiffs’
12 request to withdraw their class allegations and set a briefing schedule that allows Microsoft to
13 file a motion to deny certification of the class proposed in Plaintiffs’ Second Amended
14 Complaint. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939 (9th Cir. 2009) (“[W]e
15 conclude that Rule 23 does not preclude a defendant from bringing a ‘preemptive’ motion to
16 deny certification.”). Under this Court’s orders, Plaintiffs’ second class certification motion was
17 due on September 15, 2008, and scheduled for oral argument on December 2, 2009. *See* Dkt.
18 Nos. 143, 220-21. Plaintiffs should not be given another opportunity to manipulate the class
19 certification process by seeking to re-assert class allegations later. Allowing them to do so
20 would violate the civil rules. *See* Fed. R. Civ. P. 23(c)(1)(A) (requiring court to determine
21 whether to certify an action “[a]t an early practical time after a person sues”).

22 **B. Plaintiffs’ Request to Add New Claims Should Be Denied for Three Reasons.**

23 This Court should deny Plaintiffs’ request to introduce claims for misrepresentation and
24 injunctive relief. A district court should deny leave to amend a complaint where the proposed
25 amendment: (1) is futile; (2) produces an undue delay in litigation; or (3) prejudices the
26

opposing party. *AmerisourceBergen Corp. v. Dialysist West Inc.*, 465 F.3d 956, 951 (9th Cir. 2006). Here, this Court should deny leave to amend for all three reasons.

1. Plaintiffs' Motion Should Be Denied Because Plaintiffs' Proposed New Claims Are Futile.

Plaintiffs' motion should be denied on grounds of futility because the factual record contradicts the additional allegations they propose to make. A proposed amendment is futile if it would not survive a summary judgment motion. *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 766 (9th Cir. 1986); *Aughe v. Shalala*, 885 F. Supp. 1428, 1433-34 (W.D. Wash. 1995). Here, the evidence of record shows that Plaintiffs' proposed claims for misrepresentation and injunctive relief would be dismissed on summary judgment.

Plaintiffs first seek to add a claim that Microsoft made misrepresentations during the installation of WGA Validation through Microsoft Update. *See* proposed Third Am. Compl. ¶¶ 48-60, 232-58. But none of the remaining Plaintiffs claim to have obtained WGA Validation through that Update Service:

- Plaintiff Johnson testified that he installed WGA Validation through Automatic Updates, but not Microsoft Update. *See* Ex. B at 10; Ex. D at 31-33.
- Plaintiff Sifuentes admitted that he never installed any software from Microsoft Update, and instead claimed to have obtained WGA Validation from Automatic Updates. *See* Ex. B at 10; Ex. E at 37-38.
- The corporate designee of Plaintiff EPC has no recollection of ever visiting Microsoft Update to install updates, and said that the company installed WGA Validation through Automatic Updates. *See* Ex. B at 10; Ex. F at 41.
- Plaintiff Grennan stated that he was uncertain as to how he obtained WGA Validation and has no idea whether he ever visited the Microsoft Update Web site. *See* Ex. C at 21; Ex. G at 44-45.
- Plaintiff Verrilli confirmed in both his discovery responses and at his deposition that he installed WGA Validation through Automatic Updates. *See* Ex. C at 21; Ex. H at 48-49.
- Plaintiff Weatherill testified that he installed WGA Validation through Automatic Updates and that it was highly unlikely that he obtained WGA Validation through Microsoft Update. *See* Ex. C at 21; Ex. I at 54-55.

Next, Plaintiffs seek to add a claim that Microsoft made misrepresentations during the installation of WGA Validation through Automatic Updates (as opposed to Microsoft Update). *See* proposed Third Am. Compl. ¶¶ 60-83. Although Plaintiffs theorize that Microsoft failed to disclose that WGA Validation was installed before they provided consent, *see id.* ¶¶ 64-66, 76, their fantasy cannot be squared with the undisputed facts. Every individual who installed WGA Validation through Automatic Updates was required to accept a WGA End User License Agreement (“WGA EULA”) by clicking “I Accept” or “I Agree” *before* installing the software. *See* Dkt. No. 212 ¶ 20. The WGA EULA disclosed in plain language that the software would determine whether the user’s computer contained a properly licensed copy of Windows XP. *Id.* ¶ 28(a). If the user did not accept the WGA EULA, the software was not installed. *Id.* ¶ 20.

Plaintiffs have no evidence to the contrary. Plaintiff Johnson remembered accepting the WGA EULA, but did not know, one way or another, whether the software was installed beforehand. *See* Ex. D at 34. Similarly, Plaintiff Verrilli explained that he would have agreed to the installation of WGA Validation because he “cannot imagine the software would install without so selecting.” *See* Ex. H at 50. In the face of this fatal evidence, Plaintiffs should not be permitted to inject a baseless claim.

In their final proposed additional claim, Plaintiffs seek to recover various forms of injunctive relief. Under Washington law, however, a plaintiff cannot obtain injunctive relief unless he shows that he has a well-grounded fear of an immediate invasion of a right. *Tyler Pipe Indus., Inc. v. State, Dep’t of Revenue*, 96 Wn.2d 785, 792 (1982); *Rubin v. Juanita Shores Condominium Owner’s Ass’n*, 2005 WL 3105610, at *4 (Wn. App. Nov. 21, 2005).⁴ Here, many of Plaintiffs’ proposed claims for injunctive relief are futile because Plaintiffs have no well-

⁴ Although the claims of Plaintiffs Johnson, Verrilli, and Weatherill are governed by California law, and the claims of Plaintiff Grennan are governed by Oklahoma law, those states impose a similar requirement for obtaining injunctive relief. *Intel Corp. v. Hamidi*, 71 P.3d 296, 303 (Cal. 2003) (holding that an injunction is an “extraordinary remedy” that requires “a showing of likely irreparable injury”); *House of Realty, Inc. v. City of Midwest City*, 109 P.3d 314, 318 (Okla. 2004) (holding that an injunction requires a showing that threatened acts “will, in probability, be committed”).

grounded fear that WGA Validation will be forcibly installed on their computers.⁵ Although Plaintiffs seek injunctions that would prevent future installations of WGA Validation, *see* proposed Third Am. Compl. ¶¶ 218-19, Windows XP users have always been able to decline the installation of WGA Validation if they do not want it. *See* Dkt. No. 212 ¶¶ 4-5. Plaintiffs Verrilli and Weatherill admitted as much when they testified that they clicked an “I Agree” button before installing WGA Validation. *See* Ex. H at 50-51; Ex. I at 57-58.

Almost all of Plaintiffs’ other requested injunctions are futile in light of this Court’s summary judgment ruling that an Internet Protocol address (“IP Address”) is not personally identifiable information. *See* Dkt. No. 206, at 7. In seeking injunctions that would require Microsoft to delete the data WGA Validation collected, impose a constructive trust on that data, and/or conduct an independent audit of it, *see* proposed Third Am. Compl. ¶¶ 218-19, Plaintiffs continue to rely on their rejected assertion that an IP address constitutes personally identifiable information. *Id.* ¶¶ 47, 183, 210. Without a viable theory that Microsoft collected information that infringed upon Plaintiffs’ rights, they are not entitled to these forms of injunctive relief.

Plaintiffs’ remaining requested injunctions seek a tool for removing WGA Validation and disgorgement of revenues. *See* proposed Third Am. Compl. ¶¶ 218-19. But these forms of relief are already part of Plaintiffs’ unjust enrichment and trespass claims. *See* Second Am. Compl. ¶¶ 85, 195. If Plaintiffs wanted to add these requests for relief to their CPA claim, they should have done so when they added them to their other claims in April 2008. *Id.*

2. Plaintiffs’ Motion Should Be Denied Because of Their Undue Delay in Seeking Leave to Amend.

This Court should also deny Plaintiffs’ motion based on undue delay. Courts refuse leave to amend when there is an unreasonable delay between learning a relevant fact and seeking leave. *AmerisourceBergen*, 465 F.3d at 953. In assessing whether delay is unreasonable, courts

⁵ For example, Plaintiffs seek to add injunction claims for: (a) the provision of a tool that would allow users to decline WGA Validation; (b) the reconfiguration of WGA Validation as an opt-in program; and (c) the uncoupling of WGA from security updates. *See* proposed Third Am. Compl. ¶¶ 218-19.

1 inquire into when the moving party knew or should have known the facts and theories raised in
2 the amendment. *Id.*

3 The record here shows that Plaintiffs were aware, or should have been aware, of the facts
4 underlying their proposed misrepresentation claims no later than September 2008 – *fifteen*
5 *months before they sought leave to amend.* For example, Plaintiffs’ proposed misrepresentation
6 claims are premised upon the allegedly deceptive screenshots that were presented during the
7 installation of WGA Validation. When Microsoft served its supplemental interrogatory answers
8 in September 2008, Plaintiffs possessed the screenshots that depicted the users’ experience
9 through both Microsoft Update and Automatic Updates, descriptions of the disclosures that were
10 presented to users, and explanations of the timing of the installation of WGA Validation in
11 relation to users’ acceptance of the WGA EULA. *See* Exs. J and K.

12 Plaintiffs should have known about their proposed injunctive relief claims even earlier.
13 Their proposed Third Amended Complaint proposes to tack on injunctive remedies that are
14 based on the same CPA violations they alleged in their April 7, 2008 Second Amended
15 Complaint. Even if they could establish that they should not have known about the proposed
16 injunctive relief claims in April 2008, they most certainly knew about them on September 15,
17 2008, when they sought class certification for many of the same requests for injunctive relief that
18 they now seek to add to their complaint. *See* Dkt. No. 164, at 34.

19 Courts have denied leave to amend based on delays as short as six months. *See*
20 *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 809 (9th Cir. 1988) (denying motion where
21 plaintiffs “did not give notice of their intention to amend their complaint until ... at least six
22 months after they had become aware of the new claims”). Although Plaintiffs should have
23 known about facts underlying their proposed claims at least fifteen months ago, they remained
24 idle and allowed the case to proceed solely upon the claims set forth in the Second Amended
25 Complaint. Plaintiffs’ dilatory conduct warrants denial of leave to amend.

3. Plaintiffs' Motion Should Be Denied Because the Proposed Amendments Would Cause Microsoft Substantial Prejudice.

This Court should also deny Plaintiffs' motion because the proposed amendments would cause Microsoft to suffer substantial prejudice by having to re-do its discovery and internal investigations. *See Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994) (affirming denial of leave to amend in light of the "voluminous and protracted discovery ... expense, delay, and wear and tear on individuals and companies"). Microsoft tailored its discovery requests, deposition questions, and internal fact-gathering to the allegations in both the First and Second Amended Complaints. If Plaintiffs are once again granted leave to amend, Microsoft will be forced to re-do its internal inquiries and the discovery that it took from each of the Plaintiffs scattered around the country. By way of example, this would require Microsoft to determine how each Plaintiff purportedly saw statements on Microsoft Update even though they admitted to not using that Update Service.

The prejudice that would result from additional discovery is exacerbated by the time spent and costs incurred during the first go-around. Microsoft spent more than four and a half months trying to get complete answers to the single set of March 9, 2007 discovery requests served on the original plaintiffs. Microsoft sent eight deficiency letters and participated in two meet and confer sessions, all to no avail. *See* Dkt. No. 32 ¶¶ 3-11. Ultimately, an order compelling discovery proved necessary. *See* Dkt. Nos. 44 & 46.

Now that Microsoft has completed the exhausting process of collecting the evidence for its defense, Plaintiffs seek to inject a new set of claims. Microsoft should not be required to re-take discovery, especially when Plaintiffs have exhibited a pattern of delay. This Court should refuse to allow Plaintiffs to cause further prejudice and deny their motion.

C. If the Court Grants Leave to Amend, It Should Require Plaintiffs to Compensate Microsoft for Its Class Certification Opposition and any Additional Discovery.

If this Court grants Plaintiffs' motion and allows the filing of their proposed Third Amended Complaint, it should require Plaintiffs to reimburse Microsoft for its attorneys' fees,

costs, and other expenses for the discovery relating to their new claims. Courts routinely impose such a condition where, as here, a plaintiff seeks to add claims after a defendant has taken its discovery. *General Signal Corp. v. MCI Telecomm. Corp.*, 66 F.3d 1500, 1514 (9th Cir. 1995) (affirming grant of leave to amend conditioned upon “compensate[ing] the opposing party for additional costs incurred”); *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990) (affirming denial of leave to amend even though plaintiffs “offered to reimburse [defendants] for any additional discovery expenses” because “their offer does not take into account the opportunity costs to the Bank when its officers spend time in the discovery process”); *G & C Auto Body Inc. v. GEICO Gen. Ins. Co.*, 2008 WL 687371, at *4 (C.D. Cal. Mar. 11, 2008) (granting leave to amend because the court “can cure any prejudice by reopening discovery and shifting any additional discovery costs to GEICO.”).

If Plaintiffs are granted leave to introduce their proposed claims, Microsoft will need to re-serve written discovery and re-take depositions to ask about each Plaintiff’s experience in installing WGA Validation, their use of the Update Service, and the forms of relief they seek. Because the expenses for this additional discovery would have been significantly lessened if Plaintiff had acted in a timely manner, they should be responsible for paying them.

If leave to amend is granted, the Court should also order Plaintiffs to reimburse Microsoft for the expenses incurred in defending against their second class certification motion and set a date for submission of a fee petition. By the time Plaintiffs made their last-minute decision to withdraw their class certification motion *for the second time*, Microsoft had already incurred substantial expense in drafting its September 22, 2009 class certification opposition and preparing for the December 2, 2009 oral argument. Plaintiffs offer no explanation for the timing of this maneuver other than to say that is when they made the decision to withdraw their class certification motion for the second time. *See* Dkt. No. 223, at 1. There is no reason why Plaintiffs could not have made this decision much sooner, sparing Microsoft the enormous amount of time and money it spent. *See Collaboration Properties, Inc. v. Tandberg ASA*, 2006

1 WL 2398763, at *3 (N.D. Cal. Jun. 27, 2006) (“[C]ourts have broad power to impose reasonable
2 conditions on amendment”).

3 **D. Plaintiff Ellis Cannot Obtain Leave to Amend Because He Voluntarily**
4 **Dismissed His Claims With Prejudice.**

5 Plaintiffs’ motion should be denied to the extent that it seeks amendments concerning
6 Plaintiff Ellis because he voluntarily dismissed his claims with prejudice. *See* Dkt. No. 210. A
7 trial court is precluded from granting leave to amend a complaint after a judgment has been
8 entered unless the judgment is first re-opened. *Slezak v. TCIF*, 324 Fed. App’x 652, 653 (9th
9 Cir. 2009); *Lindauer v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996). A voluntary dismissal with
10 prejudice is the equivalent of a judgment because both operate as adjudications on the merits.
11 *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1160 (9th Cir. 2002). A court may not
12 grant leave to amend following a dismissal with prejudice because it loses jurisdiction over the
13 dismissed claims and cannot issue further orders pertaining to them. *Duke Energy Trading &*
14 *Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1049 (9th Cir. 2001); *see also Lindauer*, 91 F.3d at 1357
15 (“[B]ecause judgment had been entered and not reopened ... the district court was without power
16 to hear the motion.”).

17 Because Plaintiff Ellis voluntarily dismissed his claims with prejudice and never moved
18 to re-open his case, *see* Dkt. No. 210, he cannot obtain leave to amend.

19 **IV. CONCLUSION**

20 For the reasons stated above, Microsoft respectfully requests that the Court: (1) allow
21 Plaintiffs to withdraw the class allegations relating to their remaining claims by striking them
22 from the Second Amended Complaint; (2) impose an immediate deadline for seeking leave for
23 any further amendments as required by Fed. R. Civ. P. 16(b)(3)(A); and (3) deny Plaintiffs’
24 request to file their proposed Third Amended Complaint.

25 //

26 //

1 DATED this 4th day of January, 2010.

2 s/Karl J. Quackenbush

3 Karl J. Quackenbush, WSBA # 9602

4 Gavin W. Skok, WSBA # 29766

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2010, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

David Breskin

Alan Himmelfarb

William Houck

Daniel Johnson

Scott Kamber

Todd Nunn

Roger Townsend

Jess Webster

/s/Karl J. Quackenbush

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